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Cass R. Sunstein

Adrian Vermeule

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INTERPRETIVE THEORY IN ITS INFANCY: A REPLY TO POSNER

Cass R. Sunstein and Adrian Vermeule

I. INTRODUCTION

In law, problems of interpretation can be explored at different levels of generality. At the most specific level, people might urge that the Equal Protection Clause forbids affirmative action, or that the Food and Drug Act applies to tobacco products. At a higher level of generality, people might argue that the Equal Protection Clause should be interpreted in accordance with the original understanding of its ratifiers, or that the meaning of the Food and Drug Act should be settled with careful attention to its legislative history. At a still higher level of generality, people might identify the considerations that bear on the selection of one or another approach to interpretation, with or without reaching a conclusion about the appropriate approach.

In *Interpretation and Institutions*, we proceed at the highest level of generality, without offering final judgments about our preferred approach or about particular cases.¹ Our principal submission is that any judgment about the preferred approach must pay a great deal of attention to institutional capacities and dynamic effects. We intend this submission as a constructive one — one that helps clarify the grounds for reasonable disagreement and that suggests the possibility of empirical research that might actually be helpful. In our view, the study of legal interpretation remains in its infancy, and we are confident that in part as a result of such research, the legal culture will know a great deal more in twenty years than it knows today.² In emphasizing the importance of attending to institutional capacities and dynamic effects, we presented a survey, illustrative rather than exhaustive, of a wide range of work that seems to us to have neglected those capacities and

1. We hope that this point will clarify a number of Posner's misunderstandings. For example, we do not "deplore" what Posner calls "[t]he 'outrage' test for unconstitutionality." See Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 963 (2003) [hereinafter Posner, *Reply*]. And because our focus is not on particular results, Posner's claims of inconsistency between Sunstein's prior work and what is said here are at best overstated.

2. Exhibit No. 1: A first-year law student recently asked one of the current authors: "Can you refer me to studies of different interpretive practices in different states, and of whether state legislatures are acting differently in responses to those different practices?" The student was amazed to hear that there are no such studies, putting aside a small number of case studies and anecdotal reports.

those effects. We also attempted to identify some empirical questions that might cast light on the underlying issues.

We are grateful to Judge Posner for his spirited and lengthy reply. But his disagreements with us are minor — more rhetorical than real. In a department (not a law school) of a well-known university, senior faculty members are said to respond to new ideas in one of two ways. (a) “*We did that.*” (b) “*We never did that.*” Posner’s reply has some of this flavor.

Posner has misunderstood our views in at least three respects. First, Posner takes us to “praise . . . judicial formalism.”³ As we stated, our twofold project is to argue that the choice between formalism and antiformalism must be made on institutional and empirical grounds, rather than conceptual or linguistic grounds, and also to describe the conditions under which formalism or antiformalism would be the better choice for particular institutions or societies.⁴ One of us (Vermeule) indeed believes that current American law should become more formalist, but it is not our concern here to make the arguments on formalism’s behalf.⁵ The large stretches of Posner’s discussion that challenge interpretive formalism, then, are irrelevant to our claims.

Second, Posner accuses us of understating the extent to which past work has viewed interpretation through an institutional lens. We cannot imagine that Posner has any real disagreement with our central claim, which is that most such work is insufficiently resolute about the institutional approach. To be sure, a great deal of interpretive scholarship talks about legislatures, agencies and courts; how could it be otherwise? Of course our claim is not that we are the first to connect institutions to interpretation. In our view, however, most interpretive theorizing goes wrong either by adopting a stylized and nonempirical account of institutional capacities, or by adopting an asymmetrical account that views one type of institution, usually legislatures, through a realist lens, while viewing others, usually courts, in utopian terms. Posner does not engage these claims, challenging instead a view that we do not hold and that we agree to be ludicrous.

Third, Posner says that we deny the inevitability of casual empiricism in interpretive theory and in law generally, while failing to propose feasible empirical work ourselves. Perhaps we were insufficiently clear, but we agree that casual empiricism is inevitable. Indeed

3. Posner, *Reply*, *supra* note 1, at 952.

4. Posner’s claims about how a “literalist” would interpret the Constitution, *see id.* at 962-63, raise many complexities. The most obvious of these is that in most of the cases he discusses, the relevant provisions are ambiguous, and no literal meaning requires the results he describes. For example, the Equal Protection Clause literally requires equal protection, but without more specification, that requirement does not require, permit, or forbid affirmative action.

5. *See* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000).

we would go further: in the absence of empirical knowledge, people need to rely on presumptions, rules of thumb, and other techniques that help produce decisions in the face of uncertainty.⁶ But the inevitability of casual empiricism, in areas where little is yet known, doesn't mean we can't simultaneously try to find out more; casual and formal empiricism are not mutually exclusive, as Posner seems to assume. In any case, we have tried to suggest a number of empirical projects, just one of them involving an understanding of the performance of state courts.

In the remainder of this Reply, we investigate two of Posner's objections in greater detail, simply because an investigation of those objections might clarify our basic claims. The first objection involves different types of institutional blindness. The second involves the feasibility and usefulness of empirical work, especially in light of the apparent difficulty of evaluating empirical findings without antecedent agreement on what constitutes a correct or incorrect interpretation.

II. BLINDNESSES

Our article identified three types of institutional blindness. We might describe the three types along the following lines.

(1) Out-and-out Philosophizing.

These are theorists who attempt to derive an account of interpretation from resolutely noninstitutional premises, particularly high-level political concepts like "democracy" and "authority," or abstractions about the character of language. Posner is right to say that philosopher-lawyers like Dworkin are the paradigm example here. Posner says that these philosopher-lawyers aren't trying to answer all the relevant questions at once; they're focusing on first-best questions, leaving institutional considerations for other scholars. But to this point he also supplies the right rebuttal: doing a partial analysis is valuable, but it isn't possible to use that analysis to derive conclusions about specific interpretive doctrines and outcomes, absent any account of the institutional considerations that always intervene between abstract premises and concrete conclusions.

So far, so good. The trouble is that Posner suggests, incorrectly, that this is our charge against all interpretive theory. We agree that many previous accounts have considered institutional ideas in some fashion or other. But in addition to ignoring institutional considerations entirely, there are other ways in which interpretive theories go wrong. Most accounts of interpretation have stumbled into additional pitfalls.

6. *See id.*

(2) *Stylized Institutionalism.*

Here the interpretive theorist talks about comparative institutional competence, but in a stylized or stereotyped way, on the basis of abstract visions of “legislatures” and “courts.” This is our understanding of Hart and Sacks: the talk is of institutions, but the institutions are pictured in fuzzy, and excessively laudatory, ways that correspond only hazily to the realities of American government. (As explained below, we fear that Posner may be making the same mistake when he describes American appellate courts as councils of “wise elders,”⁷ except that Posner is not as charitable to legislatures as were Hart and Sacks.)

(3) *Asymmetrical Institutionalism.*

Here the characteristic mistake is to take a cynical or pessimistic view of some institutions and a unjustifiably rosy view of others. In constitutional law, John Hart Ely’s “process” theory,⁸ in which farsighted and politically responsible courts police invidious stereotyping and other process failures on the part of dysfunctional legislatures, is an exemplar. Ely’s theory is attractive to many; but what if courts are unwilling to do what Ely urges, and what if courts would fail to do the task well if they tried? Much of public choice theory is similar, albeit with a different diagnosis of process failure — one that sees inefficient rent seeking by legislators and interest groups, rather than racial discrimination, as the principal danger that the process-policing judiciary is to prevent.⁹ (Eskridge, by the way, seems to us to make the same mistake, albeit with slightly different emphases.) Posner taxes us for not mentioning process theory or public choice, but he seems not to realize that asymmetrical accounts of this sort can’t be taken very seriously anymore, at least not as offering complete support for any view of interpretation. Treatments by Komesar, Elhauge, and others have demonstrated, in different but compatible ways, the inability of asymmetrical institutionalism to underwrite plausible conclusions about constitutional and statutory interpretation.¹⁰

We may summarize our overview of interpretive theory by saying that we argue for *an institutionalism that is evenhandedly empirical* — an institutional account that is realistic about the capacities of all relevant actors. Our challenge to interpretive theories past and present, then, is not the absurdly sweeping claim that Judge Posner attributes

7. See Posner, *Reply*, *supra* note 1, at 959.

8. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

9. For overviews and selections from this literature, see DANIEL FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); MAXWELL STEARNS, *PUBLIC CHOICE AND PUBLIC LAW* (1997).

10. For a discussion of these scholars and their work, see Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 937 (2003) [hereinafter Sunstein & Vermeule, *Interpretation and Institutions*].

to us, to the effect that institutional issues are generally or universally ignored.

As for Posner's own work on interpretation: to date, he himself has fallen firmly into the third category, that of asymmetrical institutionalism, because he holds a persistently jaundiced picture of legislative and administrative capacities and a persistently celebratory view of (other) appellate judges. Consider Posner's amusing vision of American appellate courts as councils of "wise elders."¹¹ (Does this apply to state appellate courts, say the Rhode Island intermediate courts, as well as to the Seventh Circuit?) Posner says that this vision rests on "institutional factors."¹² So it does, in part, but the qualifier is crucial: the only factors Posner's partial analysis considers are characteristics of judges that happen to support a benign view of judicial capacities. Here is Posner's discussion:

Judges of the higher American courts are generally picked from the upper tail of the population distribution in terms of age, education, intelligence, disinterest, and sobriety. They are not tops in all these departments but they are well above average, at least in the federal courts because of the elaborate preappointment screening of candidates for federal judgeships. Judges are schooled in a profession that sets a high value on listening to both sides of an issue before making up one's mind, on sifting truth from falsehood, and on exercising a detached judgment. Their decisions are anchored in the facts of concrete disputes between real people. Members of the legal profession have played a central role in the political history of the United States, and the profession's institutions and usages are reflectors of the fundamental political values that have emerged from that history. Appellate judges in nonroutine cases are expected to express as best they can the reasons for their decisions in signed, public documents (the published decisions of these courts) and this practice creates accountability and fosters a certain reflectiveness and self-discipline.¹³

Revealingly absent from this account, however, is the requisite *comparison* of these factors to the characteristics of legislators (or for that matter agency officials). Legislators are also picked from the upper tail of the population distribution on all the measures Posner mentions, and if they are not so detached as judges they have much better information about real-world consequences than judges do. A whiff of guild interest hangs about Posner's discussion when he says that "[m]embers of the legal profession have played a central role in the political history of the United States, and the profession's institu-

11. Posner, *Reply*, *supra* note 1, at 959.

12. *Id.*

13. *Id.* at 959 n.33 (quoting Richard A. Posner, *Pragmatic Adjudication*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 235, 243-44 (Morris Dickstein ed., 1998) [hereinafter Posner, *Pragmatic Adjudication*]) (internal quotation marks omitted).

tions and usages are reflectors of the fundamental political values that have emerged from that history.”¹⁴ We would be surprised if Posner really believes that lawyers, as a class, have unique insight into the nation’s fundamental political and moral values. And in any event legislators are often lawyers as well. Posner urges that we simply “disagree” with his assessment of institutional capacities. Not so. The point of disagreement is that we think his assessment fails, not because it is substantively erroneous (we are agnostic about that), but instead because it neglects to provide a full comparative assessment of the relevant institutional factors.

III. ANTECEDENT AGREEMENT AND THE FUTURE

Posner briefly suggests that our proposal for empirical investigations, attempting to identify mistakes and injustices, “is a nonstarter unless there is some objective method of determining which decisions are mistaken or unjust.”¹⁵ We are more optimistic. In some cases, people who disagree on the “objective method,” or at least the right method, might be able to agree that one or another result counts as mistaken or unjust. Imagine, for example, a jurisdiction in which literalist interpretations produced outcomes that no reasonable person could endorse, and in which the relevant legislature could not anticipate those outcomes in advance or correct them after they occurred. In such a jurisdiction, the case for absurdity-avoiding nonliteral interpretations, at least in compelling circumstances, would be very strong.¹⁶ Nor is the example fanciful. Is it irrelevant, in this regard, that in the United States (and many other nations as well), there seems to be a consensus in favor of interpreting statutes nonliterally in the case of obvious drafting errors?¹⁷

Posner doesn’t like all of our proposals for empirical work. He suggests research projects that he would prefer. But we continue to believe that it would be revealing and informative to know whether courts are especially literalist in areas in which Congress is engaged in more aggressive oversight of judicial decisions. If this is so, literalism would be well-matched to congressional attentiveness. We also think it eminently feasible, and potentially valuable, to compare the interpretive practices of the various states, to have a better sense of what

14. *Id.* (quoting Posner, *Pragmatic Adjudication*, *supra* note 13, at 235, 243-44) (internal quotation marks omitted).

15. *Id.* at 966.

16. Hence this is the short answer to the final question on Judge Posner’s list of questions. *See id.* at 970-71. All of the questions are interesting and important, but the sixth is the only that directly bears on our claims. *See id.* at 971.

17. For more detailed discussion, see Sunstein & Vermeule, *Interpretation and Institutions*, *supra* note 10.

judges are actually doing. We agree that rigorous empirical studies present a daunting challenge; the empirical study of law remains in its infancy.¹⁸ (We confess that we are not terribly excited about Posner's suggestion that academics should study the relationship between state legislative activity and judicial salaries. To each his own!)

But our major goal is not to set out a formal empirical agenda of any kind. We urge that large-scale conceptual claims cannot settle current disputes about interpretation; that any claims about interpretation are incomplete if they ignore institutional considerations; and that an understanding of those considerations helps explain what, exactly, reasonable people are currently disagreeing about. We do not take Posner to have challenged any of these claims. Indeed, he has given further reasons to accept all of them. We might be having a debate. But we do not believe that we are having a disagreement.

18. Of course, many law professors are not trained to do empirical work, but this is changing. We have referred to William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).